Filed 1/15/19 In re A.S. CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| In re A.S., a Person Coming Under the Juvenile Court Law. | |
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>A.S.,<br><br>Defendant and Appellant. | E069904<br><br>(Super.Ct.No. J272979)<br><br>OPINION |

APPEAL from the Superior Court of San Bernardino County. Pamela P. King, Judge. Affirmed with directions.

Renee Paradis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Melissa Mandel and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court found true an allegation defendant and appellant, A.S. (Minor), born in April 2002, annoyed or molested his stepsister, the victim. (Pen. Code § 647.6, subd. (a)(1); count 1.)[1] The court declared Minor a ward of the court and placed him on one year of formal probation in the custody of his mother on various terms and conditions. On appeal, defendant contends two of the conditions of his probation must be modified. We affirm.

## I. FACTUAL AND PROCEDURAL HISTORY

The victim testified that in July 2017, when she was 11 years old, she was laying on the bed in her mother's room while her parents were away from home. Minor, her stepbrother, came into the room and laid down beside her on the bed. The victim told him to leave because she was about to go to sleep. Minor would not leave. About two minutes later, the victim climbed under the covers. Minor got under the covers with her.

Minor began to touch the victim's thigh, moving his hand back and forth and up and down her leg. She told him to stop. Eventually Minor stopped; however, he started doing it again. The victim again told Minor to stop. Eventually he stopped.

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[1] The juvenile detention disposition report dated January 29, 2018, erroneously reflects Minor admitted the allegation against him. We shall direct the trial court to correct the juvenile detention disposition report. (See *People v. Jones* (2012) 54 Cal.4th 1, 89 ["It is well settled that '[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]' [Citation.] When an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, [appellate courts have] the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties. [Citation.]"].)

The victim told Minor to leave again because she wanted to go to sleep. Minor got out of the covers, came over to her side of the bed, and pushed her. The victim laid back. Minor laid on top of her. The victim told him to get off; she pushed him off her. Minor said: "'Just love me for five minutes, and I will get out[.]"

The victim told Minor to get out. Minor put his arm underneath her waist and pulled her on top of him. The victim got off Minor and told him to leave again. He told her he would leave, but would "go bug" her younger sister who was nine years old at the time. The victim told Minor to leave her sister alone. Minor eventually left the room.

Later that month the victim was at a pool party. After the party was over, the victim went to sleep. She awoke later and went outside to get some water. The victim sat down in a chair outside. Minor was in the hot tub; Minor's friend was by "a little playground next to another door."

Minor exited the hot tub naked; the victim could see his penis. Minor was drunk. Minor's friend told him to pull his pants up. Instead, Minor walked toward the victim and tried to sit in her lap. He grabbed her arm and tried to pull her close to him.

The victim told Minor to stop. Minor kept pulling her close to him. The victim poked Minor in the eye and ran inside the house.

Minor's friend, who was present at the pool party, testified on Minor's behalf. Minor had 11 shots of vodka that night and was drunk. They went inside the jacuzzi that night. The victim came outside and sat in a chair. Minor and his friend were sitting on the side of the jacuzzi and Minor fell in.

Minor's shorts came down. Minor got out of the jacuzzi and his shorts were still down a little bit with his penis hanging out. Minor started walking around. Minor's friend told him to pull up his shorts. Minor kept walking around with his pants down.

Minor got close to the victim. The victim told Minor to stop and threatened to tell their father. The victim went inside.

Minor's friend told him to pull up his pants again. Minor finally did so. Minor never sat on or grabbed the victim.

The People argued that either incident was sufficient to support a true finding on the allegation. The court found the allegation true.

In the probation officer's report, the probation officer noted Minor denied the incident. Minor said he had had 11 shots of vodka and blacked out the night of the party and had no memory of what happened. The officer noted: "There is no gang affiliation in the family."

The probation officer recommended formal probation on various terms and conditions including the following: Term 12: "Not knowingly possess any dangerous or deadly weapons, including but not limited to any knife, gun, or any part thereof, ammunition, blackjack, bicycle chain, dagger or any weapon or explosive . . . ." Term 17: "Not knowingly associate with any co-participant or person he/she personally knows to be a probationer, parolee or gang member unless approved by probation officer." Term 19: "Not associate with persons known to you to be criminal street gang members

or visit, or remain, in any specific location, which you know to be, or which the Probation Officer informs you, is an area of criminal street gang related activity."

At the disposition hearing, defense counsel objected to proposed probation conditions 7, 14, 18, 19, 21, and 22. As to term 19, defense counsel argued the condition was overbroad and had no nexus to the allegation. The court and the People agreed. The juvenile court modified conditions 7, 14, and 21. The court struck conditions 19 and 22. The court declared Minor a ward of the court and placed him on formal probation for one year.

## II. DISCUSSION

Minor contends probation conditions 12 and 17 must be modified because they are overbroad. Specifically, Minor maintains condition 12 must be modified to reflect that a bicycle chain is only forbidden when carried on its own as a weapon, as opposed to when riding a bicycle. As to term 17, Minor asserts the condition requiring that he not associate with gang members, probationers, and parolees must be stricken because it is identical to part of proposed condition 19 which the court struck. The People contend Minor forfeited the issues. We agree with the People. Regardless, imposition of the conditions was within the juvenile court's discretion.

### A. *Forfeiture*

"Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal. [Citations.] As the United States Supreme Court recognized . . . '"[n]o

procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."' [Citations.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 880-881.) "Applying the [forfeiture] rule to appellate claims involving discretionary sentencing choices or unreasonable probation conditions is appropriate, because characteristically the trial court is in a considerably better position than the Court of Appeal to review and modify a sentence option or probation condition that is premised upon the facts and circumstances of the individual case. Generally, application of the forfeiture rule to such claims promotes greater procedural efficiency because of the likelihood that the case would have to be remanded to the trial court for resentencing or reconsideration of probation conditions." (*Id.* at p. 885.)

"[A]n unconstitutionally vague or overbroad probation condition does not come within the 'narrow exception' to the forfeiture rule made for a so-called unauthorized sentence or a sentence entered in excess of jurisdiction." (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 886-887.) However, "a challenge to a term of probation on the ground of unconstitutional vagueness or overbreadth that is capable of correction without reference to the particular sentencing record developed in the trial court *can* be said to present a pure question of law. Correction on appeal of this type of facial constitutional defect in the relevant probation condition, similar to the correction of an unauthorized sentence on

appeal, may ensue from a reviewing court's unwillingness to ignore 'correctable legal error.' [Citation.]" (*Id*. at p. 887.)

Here, Minor neither challenges the constitutionality nor the facial validity of the probation conditions. Rather, Minor challenges the first condition as it relates to the charged offense and the second condition as contrary to the juvenile court's intent. Both require consideration of the facts and circumstances of Minor's case which the juvenile court was in a considerably better position than this court to review. (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 885, 887.) Moreover, Minor had ample opportunity to request modification of the probation terms of which he now complains. Indeed, defense counsel objected to all or portions of six of the proposed probation conditions below. Minor received completely or partially favorable rulings as to five of the six conditions to which he objected. Thus, Minor forfeited his complaints about the probation conditions.

B. *Probation Conditions*

Assuming arguendo that Minor did not forfeit his complaints about the probation conditions, we hold the juvenile court properly imposed the conditions as written.

"Under Welfare and Institutions Code section 730, subdivision (b) the juvenile court 'may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.' 'A condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct

which is not reasonably related to future criminality. . . .'" [Citations.] All three factors must be present to invalidate a condition of probation. [Citation.]" (*In re R.V.* (2009) 171 Cal.App.4th 239, 246.)

"'An appellate court will not disturb the juvenile court's broad discretion over probation conditions absent an abuse of discretion. [Citations.] We grant this broad discretion so that the juvenile court may serve its rehabilitative function and further the legislative policies of the juvenile court system. [Citations.] [¶] In fashioning the conditions of probation, the juvenile court should consider the minor's entire social history in addition to the circumstances of the crime. [Citation.] Thus, "[a] condition of probation which is [legally] impermissible for an adult criminal defendant is not necessarily unreasonable for a juvenile receiving guidance and supervision from the juvenile court."' [Citation.]" (*In re R.V., supra,* 171 Cal.App.4th at p. 246.)

"'In distinguishing between the permissible exercise of discretion in probationary sentencing by the juvenile court and that allowed in "adult" court, we have advised that, "[a]lthough the goal of both types of probation is the rehabilitation of the offender, '[j]uvenile probation is not, as with an adult, an act of leniency in lieu of statutory punishment . . . .' [¶] In light of this difference, a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court."' [Citation.]" (*In re R.V., supra,* 171 Cal.App.4th at pp. 246-247, quoting *In re Sheena K., supra,* 40 Cal.4th at p. 889.) "'[J]uvenile conditions may be broader than those pertaining to adult offenders. This is

because juveniles are deemed to be more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed.' [Citation.]" (*In re R.V.*, *supra*, at p. 247.)

As to the first condition regarding the bicycle chain, we note that the California Supreme Court stated in *People v. Olguin* (2008) 45 Cal.4th 375: "A probation condition should be given 'the meaning that would appear to a reasonable, objective reader.' [Citation.]" (*Id*. at p. 382.) We view the probation condition here in light of *Olguin* and presume a probation officer will not interpret it in an irrational or capricious manner. (*Id.* at p. 383.) Thus, we do not believe the condition would be interpreted, as defendant suggests, to apply to riding a bicycle. Indeed, the condition itself requires that defendant wield a bicycle chain as a dangerous or deadly weapon. In any event, if a probation officer does interpret the condition in any arbitrary manner, Minor may then file a petition for modification of his probation condition. (See Pen. Code, §§ 1203.2, subd. (b)(1), 1203.3, subd. (a); see *People v. Keele* (1986) 178 Cal.App.3d 701, 708 [trial court retains jurisdiction to review probation officer's actions].)

As to the second condition, Minor maintains that the juvenile court intended to strike the provision requiring Minor not associate with gang members, probationers, and parolees because it struck proposed term 19 which contained similar language. The problem with Minor's argument is that proposed term 19 contained additional language not present in term 17 which would have prohibited Minor from remaining in any specific area which he knew or the probation officer informed him was an area of

criminal gang-related activity. It is entirely possible and plausible that the juvenile court simply wished to strike the latter language and recognized that by striking the entire condition it would be maintaining the portion of the probation term restricting Minor from associating with gang members, probationers, and parolees as present in term 17. This is precisely the type of issue which should have been raised below so that the juvenile court could explain its reasoning. Moreover, the condition relates to conduct which could be reasonably related to future criminality and may enhance Minor's prospects of rehabilitation. Thus, the condition was within the juvenile court's broad discretion.

## III. DISPOSITION

The judgment is affirmed. The juvenile court is directed to correct the juvenile detention disposition report to reflect the court found the allegation against Minor true.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

RAPHAEL
J.